No. 681.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the Schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

PETITION FOR RE-HEARING.

R. H. COUNTRYMAN,
of Counsel for Appellant.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. D. HUME, Claimant of the Schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

No. 681.

PETITION FOR RE-HEARING.

The appellant respectfully requests a re-hearing herein.

The main issue in the case is one of agency, and not of admiralty. The "Berwick" employed the "Fulton" to tow her into Astoria. The "Fulton" sublet the contract to the "Escort". To the owners of the "Fulton," appellant would not have any legal defense to offer in an action brought to recover the contract price, to-wit, not less than $100.00 nor more than $250.00, but because the "Fulton" and the "Escort" divided the towage by an agreement to which the "Berwick" was not a party, we are put to a double charge, largely in excess

of the contract price. Suppose the owners of the "Fulton" had sued appellant, what defense could he offer? Suppose the owners of the "Fulton" brought their suit in State Courts, there would be a recovery there, and a recovery by appellee before the U. S. District Court. There is nothing to prevent the owners of the "Fulton" from bringing such an action now. The thought suggests itself that appellant might plead the Statute of Limitations, or in other words, concede the liability, but deny the remedy. Would that be a good defense? The action is transitory. Mr. Hume was absent from the United States for some months, and there is a serious question, whether, either under the law of California or of Oregon, the Statute of Limitations would run in his favor. But why should he, if sued, be driven to make this defense? Would it be honest in him to do so? His captain made the contract, and he was willing to comply therewith and to pay for the services pursuant to its terms. (Tr. pp. 61 & 62.)

The contract is a simple case of agency. Citation of authority seems unnecessary to support the proposition that if A employs B to perform a certain service, and B sublets the contract to C, the contract between A and B is not thereby changed or altered in any particular, neither is the burden of A increased, no matter what the relations may be between B and C. As a matter of convenience B selects C to perform the work which B contracted to do for A. It is immaterial to A who performs the service, and C is simply the agent or employee of B in the performance of the work. The rule is elementary, the only exception being where B is

to perform a service that is entirely personal, as for example, if B were a famous opera singer, or a great actor, or a great musician, and had contracted to fill certain engagements, he could not employ a substitute, but in the ordinary course of business and in the consummation of an ordinary business contract B could employ any person for his agent or employee he saw fit; the person so employed, C, must look to B for his compensation, the contract for the performance of the work being confined to A and B.

The idea of novation suggested by appellee in his brief, page 17, which was filed subsequent to the oral argument, shows confusion of thoughts on legal principles. Novation is a substitution of a new obligation for an existing one, and what counsel speaks of as a novation would simply be an assignment of indebtedness by the owners of the "Fulton" to the owners of the "Escort". There was no new obligation. The obligation of the "Berwick" was not changed by the substitution of a new creditor by assignment. The assignment of a debt, or of an obligation, is not a novation. There is no new debt, simply a new creditor.

The rule in admiralty is not different. The authority cited on page 10 of our brief unquestionably established the proposition that a salvage contract, unless inequitable, is enforceable by the salvor, and that he should be bound, as well as benefited, by such a contract seems axiomatic. The ordinary towage charge would have been $69.00 and therefore there is nothing inequitable in our position that the "Fulton" and the "Escort" should not have been allowed, particularly

without our consent, to vary the contract to our prejudice. In fact we never recognized the "Escort" in any capacity except as the instrument of the "Fulton". By agreement between the "Fulton" and the "Escort" the "Escort" was substituted to tow the "Berwick" into Astoria. The "Berwick" was not consulted in the transaction and not a party to the substitution. The "Berwick" refused to take the hawser of the "Escort" until ordered to do so by the "Fulton". Anderson, the captain of the "Berwick", simply acted as any sailor would have done who was trained to obey orders. A vessel in tow always obeys the orders of the towing vessel.

We think that the portion of the opinion of the Court reading as follows, "We are of the opinion that the tes-
" timony on behalf of the claimant does not discredit
" the claim that a substantial salvage service was ren-
" dered the 'Berwick' in distress by the steamer 'Ful-
" ton' and the tug 'Escort', and that under the circum-
" stances of this case both these services should be
" treated as one continuous salvage service", is not sustained by the evidence, and is opposed to well established principles of agency.

While in one sense it is true that the "Fulton" and "Escort" rendered one continuous service, it is only true when considered in the light of principal and employee, and as being a service performed under a contract of employment in the consummation of which the "Escort" was a mere employee of the "Fulton". The service was in no sense a salvage service. The agreement between the "Berwick" and the "Fulton" was one of

towage. Salvage services would have been refused. The evidence is conclusive on that point, and the Court should not make a contract for the parties which they would not have made for themselves.

But whether the agreement was one of towage or salvage the agreement was made by the "Berwick" with the "Fulton", and the "Escort" by its agreement with the "Fulton" could not render the "Berwick" liable to it for any service which the "Escort" rendered pursuant to its agreement with the "Fulton".

In the opinion it is said, "The agreement reached " between the masters of the 'Berwick' and 'Fulton' " that the latter should tow the 'Berwick' into the Col- " umbia River and leave the compensation to be settled " by the owners of the 'Fulton' and the 'Berwick' was " not limited by the previous offer of the master of the " 'Fulton' to perform the service for $250. That offer " was rejected, as was the offer of the master of the " 'Berwick' to pay $100.00 for such service. It re- " mained then for the owners of these two vessels to " agree upon the compensation to be fixed for the ser- " vices rendered the 'Berwick', and failing in this to " have the question determined by the Court."

The owners of the "Berwick" and "Fulton" did not fail to come to an agreement as to the amount of compensation to be paid the "Fulton", and until such failure, or at least until a refusal on the part of the owner of the "Berwick" to reasonably consider the amount of such compensation, no cause of action arose, and any action brought by the owners of the "Fulton" against the owner of the "Berwick" would be premature, unless

the owner of the "Berwick" had refused to agree upon the amount of compensation or to give the question of compensation reasonable consideration. Certainly the owners of the "Escort" are not in any higher or better position than the owners of the "Fulton". Looking at the matter from the most favorable standpoint of appellee, the owners of the "Escort" simply stand in the shoes of the owners of the "Fulton", and have no greater right than the owners of the "Fulton".

To our mind there seems to be no chance for argument that the agreement between the master of the "Fulton" and the master of the "Berwick" was that the amount of compensation was to be not less than $100.00 and not more than $250.00. It is plain that they were agreeing on a minimum and maximum charge. The Captain of the "Berwick" refused to pay $250.00 because he thought that amount was extortionate, and to think that he would set the matter at large and put himself in a position where his vessel might be charged with more than $250.00 is simply inconceivable. This contract should be considered from the standpoint of a seafaring man, and the implications and mutual understanding that men have when making verbal contracts. A contract made on the high sea through speaking trumpets is not apt to have the circumstantiality of detail that is found in a legal document with its preambles and amplifications.

Assume that A, B, and C are in a room, A contending that a certain service is worth $100.00, B contending that the service is worth $250.00, and finally they say: "We leave the question to C." There could

be no doubt that all parties would understand that C was to fix the amount between $100.00 and $250.00 and not be permitted to fix it at $5.00 or $5,000.00. The question in dispute is between the $100.00 and the $250.00. The rejection is to be limited to those two amounts. Those are the amounts that the parties have in mind as a minimum and maximum amount between which the arbitrator is to fix the amount to be paid. There never was any idea in the minds of these contending Captains to set the entire matter at large, and have any referee, either the owners of the vessels, or the Court, award more or less than the minimum and maximum amounts over which they were contending.

We earnestly call the Court's attention to the authorities and argument set forth in our brief, which we deem it unnecessary to repeat, and respectfully submit that the Court has erred in affirming in applying the law to the facts disclosed by the record.

R. H. COUNTRYMAN,
of Counsel for Appellant.

I hereby certify that the foregoing petition for rehearing is in my opinion well-founded in point of law, and that it is not interposed for delay.

R. H. COUNTRYMAN,
of Counsel for Appellant.